In the Supreme Court of the United States

OCTOBER TERM, 1904.

AH SIN,

Plaintiff in Error,

vs.

GEORGE W. WITTMAN, as Chief of Police of the City and County of San Francisco, State of California,

Defendant in Error.

No. 245.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

STATEMENT.

The writ of error in this case is directed to the Superior Court in and for the City and County of San Francisco, State of California, upon a final judgment of that Court, rendered and entered therein in a cause entitled, "In the matter of the petition of Ah Sin for the writ of habeas corpus," being case number 15,198 in said Superior Court, and wherein was drawn in question the validity of a certain authority and a certain municipal ordinance of the City and County of San

Francisco, on the ground of repugnancy to the Constitution, treaty and laws of the United States, and the decision and judgment of the Superior Court were in favor of the State authority; and wherein also was drawn in question the construction of a clause of the Constitution of the United States and of a treaty of the United States with the Empire of China, and the decision and judgment of the said Superior Court were against the title, right, privilege and exemption specially set up and claimed in that behalf. The plaintiff in error was arrested by warrant and process issuing from the Police Court of the City and County of San Francisco, upon a complaint filed therein and charging him with violating Section 2 of a certain municipal ordinance of San Francisco (Rec., pp. 6, 7, 8), of which the following is a true copy:

"Bill No. 944.

"Ordinance No. 937.

"Prohibiting the exposure of gambling tables or implements in a room barred or barricaded in any manner to make it difficult of access or ingress to police officers, when three or more persons are present; or the visiting of a room barred and barricaded or protected in any manner to make it difficult of access or ingress to police, in which gambling tables or implements are exhibited or exposed when three or more persons are present.

" Be it ordained by the People of the City and Coun-
" ty of San Francisco as follows:

" Section 1. It shall be unlawful for any person
" within the limits of the City and County of San Fran-
" cisco to exhibit or expose to view in any barred or
" barricaded house or room, or in any place built or
" protected in a manner to make it difficult of access or
" ingress to police officers when three or more persons
" are present, any cards, dice, dominoes, fan-tan table
" or lay-out, or any part of such lay-out, or any gam-
" bling implements whatsoever.

" Section 2. It shall be unlawful for any person
" within the limits of the City and County of San Fran-
" cisco to visit or resort to any such barred or barri-
" caded house or room or other place built or protected
" in a manner to make it difficult of access or ingress
"to police officers, where any cards, dice, dominoes,
" fan-tan table or lay-out, or any part of such lay-out,
" or any gambling implements whatsoever are exhibit-
" ed or exposed to view when three or more persons
" are present.

" Section 3. Every person who shall violate any of
" the provisions of this ordinance shall be deemed
" guilty of misdemeanor, and upon conviction thereof
" shall be punished by a fine not to exceed five hun-
" dred dollars, or by imprisonment in the County Jail
" for not more than six months, or by both such fine
" and imprisonment.

"Section 4. This ordinance shall take effect and be "in force on and after its passage."

The record (p. 8) shows that "after a trial had by "the said Police Court upon the said complaint, and on "proof uncontradicted and unimpeached that the "premises therein described, to-wit: said house and "room, were barred and barricaded and protected only "against such police officers as had no right to enter "said premises, and who were mere trespassers," the plaintiff in error was adjudged guilty by said police court of being a visitor to said premises, and although, as the record shows (p. 8), "he visited the same inno- "cently and for a lawful purpose, and without any "knowledge that the same were barred or barricaded "or built or protected in a manner to make it difficult "of access or ingress to police officers, and without "any knowledge that there was exhibited or exposed "to view on said premises, any cards, dice, dominoes, "fan-tan table, or lay-out, or any gambling imple- "ments whatsoever."

The plaintiff in error was granted a writ of habeas corpus by the Superior Court, and the foregoing facts are pleaded in the petition. All the facts set forth in the petition for habeas corpus are by stipulation, conceded to be true, and it is so stated in the judgment of the Superior Court (Rec., p. 14). It is also alleged in the petition and admitted to be true, that the petitioner is a subject of the Emperor of China, and that the or-

dinance above referred to is "enforced and executed " by the said municipality of San Francisco, and said " State of California, solely and exclusively against " persons of the Chinese race and not otherwise." In the petition, the ordinance is attacked upon this ground, in that it operates to deny the Chinese the equal protection of the laws, thereby violating Section 1 of the Fourteenth Amendment; further, that the "ordinance " unjustly and arbitrarily discriminates in favor of " certain visitors and also in favor of certain persons " resorting to the house, room or place referred to in " said ordinance, as well as in favor of such persons " and visitors as resort to or visit such house or room " or place when not barred or barricaded or protected " in a manner to make the same difficult of access or " ingress to police officers, and is in that respect also " in violation of the Fourteenth Amendment of the " Constitution of the United States in thereby denying " to your petitioner the equal protection of the laws."

The petition for the writ of habeas corpus further avers, and the fact is admitted, that the plaintiff in error applied to the United States Circuit and District Courts for release on habeas corpus, and that his applications were denied "upon the sole and only ground " that your petitioner's remedy is by petition for the " writ of habeas corpus to the State court of compe- " tent jurisdiction, and in the event that relief is there " denied, by writ of error from the Supreme Court of

" the United States; and in support of said proposition " the following authorities are cited by said Circuit " Court, viz:

"*Ex parte Royall*, 117 U. S., 241.
"*Ex parte Fonda*, 117 U. S., 516.
"*In re Frederick*, 149 U. S., 70.
"*Pepke* vs. *Cronan*, 155 U. S., 100.
"*Bergeman* vs. *Backer*, 157 U. S., 655.
"*Whitten* vs. *Tomlinson*, 160 U. S., 231.
"*Baker* vs. *Grice*, 169 U. S., 284.
"*Markuson* vs. *Boucher*, 175 U. S., 184.

"And the following authorities are cited by the said " District Court, viz:

"*Pepke* vs. *Cronan*, 155 U. S., 100.
"*Markuson* vs. *Boucher*, 175 U. S., 184."

The foregoing matters are pleaded in the petition for habeas corpus and admitted to be true (Rec., p. 9).

It is also averred in the petition, and admitted, that the federal questions were raised in the Police Court and overruled by that tribunal; exception was duly reserved (Rec., p. 10). The petition for habeas corpus sets forth that by the provisions of said ordinance the petitioner "is " deprived of his liberty to visit or resort to the prem- " ises described in the said complaint, or to any place " or premises in the City and County of San Fran- " cisco that may be barred or barricaded or protected

" against police officers who have no right to enter
" such premises, merely because said premises are so
" barred or barricaded or protected, and there are ex-
" hibited or exposed in the presence of three or more
" persons *other than your petitioner*, the articles speci-
" fied in said ordinance, although your petitioner had
" nothing whatever to do with the barring or barri-
" cading or protecting of the premises or the exhibit-
" ing or exposing of any of the said articles, nor any
" knowledge when he visited the premises that they
" were barred or barricaded or protected against police
" officers, nor that any of said articles were exhibited
" upon the premises or in the presence of three or more
" persons. * * * That the said ordinance, to the ex-
" tent that the same makes punishable the mere act of
" visiting a house or room barred or barricaded, built
" or protected 'in a manner to make it difficult of ac-
" 'cess or ingress to police officers, where any part of
" 'such layout, or any gambling implements whatso-
" 'ever are exhibited or exposed to view when three or
" 'more persons are present,' is unconstitutional in
" that *it has no legitimate nor any relation to nor con-*
" *nection with the regulation or the prohibition or the*
" *suppression or the punishment of gambling*, and is
" not therefore within the authority of the State nor
" of the municipality of San Francisco in the lawful
" exercise of the police power; that it is an entirely
" arbitrary exertion of the powers of government and

" a violation of the Fourteenth Amendment of the Con-
" stitution of the United States, because not suscep-
" tible of being upheld as a lawful application of the
" police power of the State. Your petitioner avers that
" the State has no power to make criminal an innocent
" visit to a house or room where there is no gambling
" and where the visitor has nothing whatever to do
" with the ownership or possession or exhibition of
" any of the articles specified by the ordinance in ques-
" tion; that it is the constitutional right of your peti-
" tioner in the enjoyment of his liberty to visit any
" house or room where he can lawfully obtain admis-
" sion and where he goes for a lawful purpose, and
" while there commits no unlawful act; that even if it
" can be made criminal to bar or barricade or protect
" the house or room against all police officers, and ex-
" hibit therein in the presence of three or more persons
" any of the articles specified in the said ordinance,
" no such ordinance is a valid or constitutional exercise
" or exertion of the police power of the State if it
" makes criminal *the mere act of innocently visiting*
" *such a house or room where the visitor had no knowl-*
" *edge or notice of and nothing whatever to do with*
" *the barring or barricading of the premises, or the*
" *prohibited articles.*

" Your petitioner avers that the said ordinance is
" also void for the reason that it embraces more than
" one subject, in violation of Section 11 of Article II

" of the Charter of the City and County of San Fran-
" cisco, and the subject of the ordinance is not ex-
" pressed in its title.

" Your petitioner respectfully represents that any
" imprisonment under a void municipal ordinance is a
" deprivation of your petitioner's liberty, without due
" process of law, in violation of the Fourteenth
" Amendment of the Constitution of the United States,
" and properly justiciable upon the writ of habeas cor-
" pus.

" Your petitioner avers that by said ordinance he is
" deprived of his liberty, without due process of law,
" in that he is prohibited thereby from visiting, inno-
" cently and for a lawful purpose, the house or room
" or place mentioned in said ordinance.

" Your petitioner alleges that at all the times in this
" petition referred to, he was, ever since has been, and
" now is, a subject of the Emperor of China, and was
" at all said times, and ever since has been, and now is,
" within the jurisdiction of the State of California.

" That said ordinance is not only in conflict with Sec-
" tion 1 of the Fourteenth Amendment of the Consti-
" tution of the United States, but is also in contraven-
" tion of the treaty now existing between the United
" States and the Empire of China."

Upon the petition, the Superior Court ordered the writ of habeas corpus to issue; upon the return day of the writ, the matter was continued to a subsequent day,

when, on stipulation made by counsel, the facts were agreed upon as being the facts pleaded in the petition (Rec., pp. 13, 14). Thereupon, argument was had, and the Superior Court then rendered its judgment against the petitioner and ruled adversely to him upon each of the federal questions presented by the record; to all of which the petitioner reserved his exception (Rec., p. 14). Thereafter the writ of error was duly allowed, issued and served. The questions raised are presented on the petition to the Superior Court for the writ of habeas corpus; the stipulation that the facts are as in the petition set forth; the judgment; the assignment of errors and the writ of error.

ASSIGNMENT OF ERRORS.

The following constitute the errors relied upon in support of the prayer for a reversal of the judgment, viz:

I.

That the Superior Court committed manifest error in deciding that the plaintiff in error, the said Ah Sin, is not deprived of his liberty without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

II.

That the Superior Court committed manifest error in deciding that the plaintiff in error is not denied the

equal protection of the laws of the State of California, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

III.

That the Superior Court committed manifest error in deciding that the municipal ordinance set forth in the record, is not in conflict with Section 1 of the Fourteenth Amendment of the Constitution of the United States, and does not deprive the plaintiff in error of his liberty without due process of law.

IV.

That the Superior Court committed manifest error in deciding that said municipal ordinance does not deprive the plaintiff in error of the equal protection of the laws.

V.

That the Superior Court committed manifest error in deciding that the plaintiff in error is not imprisoned in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

VI.

That the Superior Court committed manifest error in deciding that the said municipal ordinance is not void because unauthorized by the police power of the State.

VII.

That the Superior Court committed manifest error in deciding that the said municipal ordinance is not in contravention of the treaty existing between the United States and the Empire of China.

VIII.

That the Superior Court committed manifest error in deciding that plaintiff in error is not imprisoned in violation of the treaty now existing between the United States and the Empire of China.

IX.

That the judgment of the Superior Court operates to deprive the plaintiff in error of his liberty without due process of law, in violation of the Constitution of the United States, to-wit: Section 1 of the Fourteenth Amendment.

X.

That the judgment of the Superior Court operates to deny the plaintiff in error, the equal protection of the laws, in violation of the Constitution of the United States, to-wit: Section 1 of the Fourteenth Amendment.

ARGUMENT.

1. The record shows conclusively that the ordinance in question is enforced and executed against Chinese

persons only. It is therefore in violation of the Fourteenth Amendment and void.

Yick Wo vs. *Hopkins*, 118 U. S., 356.

Say the Court:

"The cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justce is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this Court in *Henderson* vs. *Mayor of New York*, 92 U. S., 259; *Chy Lung* vs. *Freeman*, 92

"U. S., 275; *Ex parte Virginia*, 100 U. S., 339; *Neal* "vs. *Delaware*, 103 U. S., 370; and *Soon Hing* vs. "*Crowley*, 113 U. S., 703. * * * The fact of this "discrimination is admitted. No reason for it is "shown, and the conclusion cannot be resisted, that no "reason for it exists except hostility to the race and "nationality to which the petitioners belong, and "which in the eye of the law is not justified. The dis-"crimination is, therefore, illegal, and the public ad-"ministration which enforces it is a denial of the equal "protection of the laws and a violation of the Four-"teenth Amendment of the Constitution."

Yick Wo vs. *Hopkins*, 118 U. S., 373.

The ordinance is for the same reasons in violation of the "most favored nation" clause of the Treaty with the Empire of China. There can be no question as to the fact of discrimination. At page 9 of the printed Record it is stated as one of the averments of the petition for habeas corpus: "Your petitioner further avers "that said ordinance and the provisions thereof are "enforced and executed by the said municipality of "San Francisco, and said State of California, solely "and exclusively against persons of the Chinese race "and not otherwise."

This averment, by stipulation of counsel for the defendant in error, and by the judgment of the Superior Court (Rec., p. 14), is a correct statement of the fact.

As there is nothing to controvert the averment of the petition in that respect, it would be deemed a correct statement of the fact, even if there were no stipulation to that effect.

Whitten vs. *Tomlinson*, 160 U. S., 231.
Kohl vs. *Lehlback*, 160 U. S., 296.
Ex parte Smith, 143 Cal., 368, 370.

The stipulation, however, is a direct admission of the fact of discrimination.

2. It is manifest from the facts averred in the petition, and admitted by the defendant in error, that the State Court has so construed the ordinance that it makes criminal the innocent visit to a house, room or place, rightly and lawfully barricaded and barred against trespassing, by the police, and where, without the consent, connivance, or privity of the visitor, there is exposed to view the articles specified in the ordinance, there being present three or more persons. It is inseparable from the constitutional right of liberty that a person may visit any place where he is lawfully invited; and this right cannot be infringed, except where necessary in the legitimate exercise of the police power of the State. It certainly is not within the scope of the police power of the State to prohibit or punish what is entirely innocent or indifferent.

Lawton vs. *Steele*, 152 U. S., 137.
Mugler vs. *Kansas*, 123 U. S., 661.

Health Dept. vs. *Trinity Church*, 145 N. Y., 321.
In re Jacobs, 98 N. Y., 105.

"If, therefore, a statute purporting to have been "enacted to protect the public health, the public morals, "or the public safety, has no real or substantial rela- "tion to those objects, or is a palpable invasion of the "rights secured by the fundamental law, it is the duty "of the Courts to so adjudge, and thereby give effect "to the Constitution."

Mugler vs. *Kansas*, 123 U. S., 661.
Minnesota vs. Barber, 136 U. S., 320.

"Such laws must tend toward the preservation of the "lives, health, morals, or welfare of the community, "and the Court must be enabled to see some clear and "real connection between the assumed purpose of the "law and the actual provisions thereof, and that the "latter tend in some plain and appreciable manner "towards the accomplishment of the objects for which "the Legislature may use this power."

In re Jacobs, 98 N. Y., 105.

"Our Constitution and laws guarantee to every citi- "zen the right to go where and when he pleases, exact- "ing from him only that he conduct himself in a decent "and orderly manner, that he disturb no one, and that "he interfere with the rights of no other citizen."

St. Louis vs. *Roche*, 31 S. W. Rep., 915.

Speaking of the exercise of the police power, the Court has said:

"To justify the State in thus interposing its author-
"ity in behalf of the public, it must appear, first, that
"the interests of the public generally, as distinguished
"from those of a particular class, require such inter-
"ference; and, second, that the means are reasonably
"necessary for the accomplishment of the purpose, and
"not unduly oppressive upon individuals. The Legis-
"lature may not, under the guise of protecting the
"public interests, arbitrarily interfere with private
"business, or impose unusual and unnecessary restric-
"tions upon lawful occupations. In other words, its
"determination as to what is a proper exercise of its
"police powers is not final or conclusive, but is subject
"to the supervision of the Courts."

Lawton vs. *Steele*, 152 U. S., 137.

Speaking of the police power, the Court say:

"This power must, however, be exercised in subordi-
"nation to the provisions of the Federal Constitution.
"If, in the assumed exercise of its police power, the
"Legislature of a State directly and plainly violates a
"provision of the Constitution of the United States,
"such legislation would be void."

Lake Shore, etc., Ry. Co. vs. *Smith*, 173 U. S., 689.

We also invite attention to the opinion of the Court in *Gulf, etc., Ry.* vs. *Ellis,* 165 U. S., 155, 159, 165.

The record shows that the plaintiff in error visited, innocently and for a lawful purpose, the house and room referred to in the complaint, and without any knowledge that the place was barred or barricaded, or built or protected in a manner to make it difficult of "access or ingress" to police officers, and without any knowledge that there were exhibited or exposed to view, on said premises, any cards, dice, dominoes, fantan table, or lay-out, or any gambling implements whatever (Rec., p. 8), yet the State Court held that the ordinance made the visit criminal, and punishable as therein provided. And in that connection, it should be borne in mind that the State Court placed upon the ordinance the construction mentioned, although it further appeared that the place visited by plaintiff in error was barred and barricaded and protected only against such police officers as had *no right* to enter said premises, and who were mere trespassers (Rec., p. 8).

It is certainly the constitutional right of a person to bar, barricade and protect his premises against entry by police officers who have no right to enter and who are nothing else but trespassers. The principle of the common law is very eloquently expressed by Lord Chatham in the following terms:

"The poorest man may, in his cottage, bid defiance "to all the forces of the Crown. It may be frail; its

"roof may shake; the wind may blow through it; the "storm may enter; the rain may enter; but the King of "England may not enter; all his force dares not cross "the threshold of the ruined tenement."

Nor can a search be made by a police officer unless he have a valid warrant authorizing the act; he cannot enter to make an arrest, unless he have a warrant or unless he is pursuing an escaping criminal, or unless an offense is committed in his presence; but, as Bishop says:

"Ordinarily, what is done in a barred and bolted "house is not in the presence of a man outside. * * "Not even an officer can, without a warrant, break an "outer door to arrest persons within, who are merely "engaged in unlawful gaming."

1 Bish. New Crim. Proc., Sec. 197.
McLennan vs. *Richardson*, 15 Gray, 74.

Of course, a police officer may enter to arrest for a felony, but the record shows affirmatively that the premises visited by the plaintiff in error were barred against police officers who had no right to enter and who, if they had entered, would have been *trespassers.* Clearly, an ordinance that would make criminal, or an element in the definition of a crime, the act of barring or barricading premises against intrusion by trespassers, would be unconstitutional, as being an arbitrary invasion of fundamental rights, and, in effect, an enact-

ment depriving a person of a property right without due process of law.

According to the record, the result of the ordinance in question is to deprive the plaintiff in error of his liberty to visit or resort to the premises described in the complaint, or to any place or premises in the City and County of San Francisco, that may be *lawfully* barred or barricaded or protected against police officers who have no right to enter such premises, merely because the premises are barred or barricaded or protected, and there are exhibited or exposed, in the presence of three or more persons other than the plaintiff in error, the articles specified in the ordinance, although he had nothing whatever to do with the barring or barricading or protecting of the premises, or the exhibiting or exposing of any of the designated articles, nor any knowledge, when he visited the premises, that they were barred or barricaded or protected against police officers, nor that any of the prohibited articles were exhibited upon the premises, nor exhibited in the presence of three or more persons.

We insist that the ordinance, to the extent it makes criminal and punishable the mere act of innocently visiting, is unconstitutional in that it has no legitimate nor any relation to, nor connection with, the regulation, or the prohibition, or the suppression, or the punishment, of gambling, and is not, therefore, within the authority of the State nor of the municipality of San Francisco,

in the lawful exercise of the police power; that it is an entirely arbitrary exertion of the powers of government, and a violation of the Fourteenth Amendment.

The State has no power to make criminal an innocent visit to a house or room where there is no gambling and where the visitor has nothing whatever to do with the ownership or possession or exhibition of any of the articles specified by the ordinance in question. It is the constitutional right of all persons to visit any house or room where they may lawfully obtain permission to enter and where they go for a lawful purpose, and while there commit no unlawful act; and even if it can be made criminal to bar or barricade or protect the house or room against all police officers, and exhibit therein, in the presence of three or more persons, any of the articles specified in the ordinance, no ordinance is a valid or constitutional exercise or exertion of the police power of the State, if it makes criminal (and the State Court has decided it does) the mere act of innocently visiting such a house or room, where the visitor had no knowledge or notice of, and nothing whatever to do with, the barring or barricading of the premises, and nothing to do with the possession, ownership, or exhibition of the prohibited articles.

The plaintiff in error is not charged with gambling, nor with visiting a gambling-place, nor with owning or possessing, or using or exhibiting, or permitting the exhibition, of gambling implements.

We further insist that the ordinance is unconstitutional because of its discrimination in favor of the three persons who visit the designated house or room; their visit is not unlawful, but the visit of the plaintiff in error, while the other three are present, is made criminal and punishable. The plaintiff in error is thus deprived of the equal protection of the laws.

Then, again, the discrimination of the ordinance is, for the same reason, unconstitutional in permitting any number of persons to visit a house or room where the prohibited articles are exhibited, if the place is not barred or barricaded or protected in a manner to make it difficult "of access or ingress to police officers."

An ordinance similar to the one we are attacking was held valid by the Supreme Court of California in the *Matter of Ah Cheung*, 136 Cal., 678; but the points we urge were evidently neither raised or decided; and even if they had been raised and decided, it would not affect our right to have the questions passed upon by the Supreme Court of the United States. It is true, the Supreme Court of California, in the case referred to, construes the ordinance as applicable "only to "places which are specially barred and barricaded "against intrusion by officers of the law, so that illegal "gambling may be protected from discovery"; but, obviously, this does not involve any of the points we have raised in this brief, or on the record, as against the validity of this ordinance. Even giving to the ordi-

nance the construction which the Supreme Court of California says it should have, still the points we make against the constitutionality of the ordinance, and the reasoning we present in their support, continue pertinent, nevertheless; and are not in any respect met by the interpretation which the highest Court of the State has given a similar ordinance in the *Matter of Ah Cheung*, 136 Cal., 678.

No one will contend that, under the guise of the police power, the State can destroy fundamental rights. We have no doubt that the State may, by means of appropriate legislation, prohibit the barring or barricading of premises against police officers *who have the right to enter;* but surely the State cannot, under the guise of the police power, prohibit the barring or barricading of premises against policemen who have no right to enter, and who, if they did enter, would be nothing else but trespassers. We simply suggest this in response to what is said by the Supreme Court of California in the above quoted portion of its opinion. In the same connection we desire to say that the fallacy of the Court's view lies in the assumption that police officers have the legal right to enter upon private premises to ascertain whether illegal gambling is being carried on; certainly no such right exists, and its attempted exercise would be a flagrant trespass. A police officer, as such, has no right to enter on private premises unless in the execution of process, or to make an arrest for felony, or to

prevent an escape; manifestly not to discover, or suppress, or make an arrest for gambling where he has no warrant or process.

1 *Bish. New Crim. Proc.*, sec. 197.
McLennan vs. *Richardson*, 15 Gray 74.

To the same effect is Section 836 of the Penal Code of the State of California, which reads as follows:

"A peace officer may make an arrest in obedience to a "warrant delivered to him, or may, without a warrant, "arrest a person—1. For a public offense committed "or attempted in his presence; 2. When a person ar- "rested has committed a felony, although not in his "presence; 3. When a felony has in fact been commit- "ted, and he has reasonable cause for believing the per- "son arrested to have committed it; 4. On a charge "made, upon reasonable cause, of the commission of a "felony by the party arrested; 5. At night, when there "is reasonable cause to believe that he has committed a "felony."

These provisions measure the right of a ~~public~~ police officer to enter upon private premises.

It is, we think, in that respect especially, the Supreme Court of California has ignored the law by *assuming* that a police officer as such, may rightfully enter on private premises to *discover* whether illegal gambling is being carried on; but the ordinance says nothing about gambling, and merely requires the exposing to view of articles that may be used in gambling; so what-

ever the argument, the assumption indulged in by the Supreme Court of the State, is entirely untenable and inadmissible. The system of police espionage prevailing in Europe would not be lawful in the United States, nor in England. Even it would be unlawful to issue a search-warrant for the purpose of obtaining evidence of crime, by way of discovery.

Cooley's Const. Lim., p. 431 (7th Ed.).

And the same distinguished writer states the law in very clear terms, against the claim of the police to make entry on private premises for the purpose of *discovering* crime.

Cooley's Const. Lim., p. 424 (7th Ed.).

Boyd vs United States, 116 U.S. 630

And whatever may be the opinion of the Supreme Court of California, the Supreme Court of the United States will place its own construction upon the ordinance, and will not interpolate into it, in order to make it valid, a provision it does not contain. The province of the Court is not to make but to interpret laws. The fact that the State Supreme Court has construed the ordinance and read into it certain provisions does not prevent the Federal Courts from putting their own construction on the ordinance. Say the Supreme Court of the United States in passing upon the point: "That, "however, does not preclude this Court from putting "upon the ordinances of the Supervisors of the County

"and City of San Francisco an independent construct-
"ion; for the determination of the question whether
"the proceedings under these ordinances and in en-
"forcement of them are in conflict with the Constitu-
"tion and laws of the United States, necessarily in-
"volves the meaning of the ordinances, which, for that
"purpose, we are required to ascertain and adjudge.
"We are consequently constrained, at the outset, to
"differ from the Supreme Court of California upon the
"real meaning of the ordinances in question."

Yick Wo vs. *Hopkins*, 118 U. S. 366.

As the ordinance makes no distinction between an innocent visitor and a guilty one; and in effect prohibits the barring of private premises against police officers who have no right to enter; and is arbitrary in its discriminations, it is void.

We simply wish to say in conclusion that in California, there is no appeal allowed from a judgment in a habeas corpus case; and that therefore the Superior Court is in this instance, the highest Court of the State in which a decision could be had; for that reason the writ of error properly went out to the Superior Court.

Downham vs. *Alexandria*, 9 Wall., 659.
Kurtz vs. *Moffitt*, 115 U. S., 487, 489.

We respectfully submit that the ordinance in question is in conflict with the Fourteenth Amendment, and also in violation of the treaty with China. The ordinance

should, therefore, be adjudged void, and the judgment of the Superior Court should be *reversed*, with directions to discharge the plaintiff in error.

GEORGE D. COLLINS,
Attorney for the Plaintiff in Error.